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Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

Appeal From The United States District Court for The Northern District of New York.

BRIEF ON BEHALF OF CORNELL STEAMBOAT COMPANY, APPELLEE.

CURRY AND DOLAN,
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FREDERICK M. DOLAN,
THACHER, PROFFITT, PRIZER AND CRAWLEY,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Preliminary Statement	2
Questions Presented	7
Argument	9
I. The Commission Is Vested with Broad Discretion to Administer the Water Carrier Provisions of the Interstate Commerce Act in Promoting a Sound Transportation System and Protecting the Public Interest	9
II. Appellant's Contention That Its Certificate May Properly Be Construed to Include Towage and That There Has Been an Improper Attempt to Incorporate by Reference in the Certificate a Carrier Classification Other Than Towage Is Fallacious	13
(a) Great Weight Is to be Attached to the Commission's Interpretation of Its Certificate and This Is True as to Its Conclusion That Towage Is Not Authorized by Appellant's Certificate	14
(b) The History of Appellant's Certificate, Including the Clarifying Amendment of 1944 Patterning the Authority to Include Service by Freighting and Not Towing in Accordance with the Service to Which It Was Entitled Under the "Grandfather" Clause Shows the Fallacy of Appellant's Contention Here	16
(c) By Its Words and Actions Appellant Has Admitted That It Knew the Certificate Granted to It Authorized Only Freighting Rights and Did Not Include Authority to Perform Towage	23

Index Continued.

Page

(d) The Distinction Between Freighting and Towage Was Well Recognized in Decisions of the Commission Prior to the 1944 Hutton Certificate, the 1947 Transfer Order, and the 1948 Certificate Issued to Appellant, and Such Decisions Confirm the Absence of Towage Authority in Appellant's Certificate ... 25

(e) Appellant's Contention as to Alleged Improper Incorporation by Reference into Its Certificate Disregards the 1944 Amendment Excluding Towage and Is Unsound 31

III. Aside from Being Otherwise Unjustified, Appellant's Contentions as to Alleged Unauthorized Revocation of the Original 1942 Hutton Certificate and as to Claimed Unauthorized Specification of Types of Equipment and Service Were Made Too Late and Should Therefore Be Rejected 33

IV. Besides Being Made Too Late, Appellant's Contention That the Commission Is Automatically Barred From Specifying in Certificates the General Types of Equipment and the Services to be Performed Is Erroneous and Is an Unjustified Attempt to Tear Down a Long-Established System of Water Carrier Regulation 39

(a) Appellant's Contention Runs Counter to the Fundamental Purposes of the "Grandfather" Provisions of the Act 39

(b) Appellant's Contention Misconceives the Broad Powers of the Commission Under Sections 309 and 304 of the Act 40

(c) Appellant Unjustly Attempts to Uproot the Long-Established and Uniform Practice of the Commission 45

(d) Appellant's Reliance Upon the Seatrain Case Is Based Upon a Misconception and Distorted View of That Case 46

Page

V. Appellant's Contention as to Alleged Unauthorized Revocation of the Certificate of July 17, 1942, to Hutton Is Without Merit 50

VI. Appellant's Contention That the Commission's Order Constitutes a Revocation or Modification of Section 314 Authorizing Allowances Under the Act Is Erroneous 54

VII. Appellant's Claim That the Commission Has Failed to Comply With the Provisions of Section 8(b) of the Administrative Procedure Act Is Utterly Without Substance and Is Frivolous in Character 59

Conclusion 60

CITATIONS.

CASES:

Adirondack Transit Lines, Inc. v. *United States*, 324 U.S. 824 14
Alton R. Co. v. *United States*, 315 U.S. 15 ..... 12, 25, 39
American Barge Line Co. Applications, 260 I.C.C. 783 31
American Trucking Ass'ns. v. *United States*, 73 S. Ct. 307 40
American Tug Boat Co. Application, 260 I.C.C. 814 27
Arrow Tug & Barge Co. Contract Carrier Application, 260 I.C.C. 808 .. 27
Atlanta & St. Andrews Bay Ry. Co. v. *United States*, 104 F. Supp. 193 .. 59
Atlas Tug Service Contract Carrier Application, 260 I.C.C. 809 26
Baton Rouge Coal & Towing Co., Contr. Co. Application, 260 I.C.C. 761.. 31
Blaske Lines Contract Carrier Application, 260 I.C.C. 813 27
Board of Trade of Kansas City v. *United States*, 314 U.S. 534 11
Callanan Road Improvement Co. Extension—Towage, 285 I.C.C. 137 24
Campbell Transp. Common Carrier Application, 260 I.C.C. 107 ....28, 29, 31, 32, 57, 58
Central Barge Co. Applications, 260 I.C.C. 329 31
Classification of Motor Carriers of Property, 2 M.C.C. 703 33
Coastal Tank Lines v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289..32, 33
Colle Towing Co. Applications, 260 I.C.C. 681 31
Columbia Tug Boat Co. Contract Carrier Application, 250 I.C.C. 819 26
Cornell Steamboat Co. Contract Carrier Application, 250 I.C.C. 577 2
Cornell Steamboat Co. v. *United States*, 321 U.S. 634 15
Coyle Lines Common Carrier Applications, 250 I.C.C. 820 26
Crescent Express Lines v. *United States*, 320 U.S. 401 ..... 25, 39
Cumberland River Sand Co., Inc., Com. Car. Application, 260 I.C.C. 734 31
Delta V. Smyth Applications, 250 I.C.C. 817 26
Diesel Towing Co. Contract Carrier Application, 260 I.C.C. 809 26
Dixie Carriers, Inc., Rates & Allowances, 278 I.C.C. 417 ..... 35, 57, 58
Eastern Transp. Co. Contract Carrier Application. 250 I.C.C. 505 29
Erie & St. Lawrence Corp. Contract Carrier Application, 260 I.C.C. 235 ..... 27, 41
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 11
General American Tank Car Corp. v. *El Dorado T. Co.*, 308 U.S. 422 55
General Transp. Co. v. *United States, D.C.D. Mass.*, 65 F. Supp. 981 ... 59
Goss, John L., Corp. Contract Carrier Application, 250 I.C.C. 101 26

Page

Grizzaffi Motor Company Applications, 260 I.C.C. 819 27
Harbor Towing Company Contract Carrier Application, 260 I.C.C. 810 26
Hutton, Joseph R., Contract Carrier Application, 250 I.C.C. 804 16
Hutton, Joseph R., Contract Carrier Application, 260 I.C.C. 804 16
Hutton, Joseph R., Certificate Transfer, 265 I.C.C. 813 ...16, 21, 24, 36, 52, 53
Hutton Contract Carrier Application, 285 I.C.C. 75 1
Inland Navigation Co. v. *United States*, 76 F. Supp. 567 .....26, 43, 60
Inland Waterways Corporation Common Carrier Application, 260 I.C.C. 808 27
Interstate Com. Com. v. *Diffenbaugh*, 222 U.S. 42 55
Interstate Commerce Commission v. *Jersey City*, 332 U.S. 503 10
Interstate Commerce Commission v. *Parker*, 326 U.S. 60 .....10, 39
Isthmian S. S. Co. Common Carrier Application, 250 I.C.C. 735 42
Knappton Towboat Company Common and Contract Carrier Application, 250 I.C.C. 812 26
McLean Trucking Co. v. *United States*, 321 U.S. 67 40
McWilliams, James, Blue Line, Inc., Com. Car. Application, 260 I.C.C. 15 26
Mecking, A. L., Barge Line Common Carrier Application, 250 I.C.C. 77 .....27, 41, 42
Mirene Co. Applications, 260 I.C.C. 689 31
Noble v. *United States*, 319 U.S. 88 25
Norfolk Baltimore and Carolina Line, Inc., Ext.—James R., 265 I.C.C. 247 .....27, 40, 41, 42, 44, 46, 59
Ohio River Company Contract Carrier Application, 260 I.C.C. 810 26
Olson Tug Boat Co. Applications, 260 I.C.C. 814 26
Olympia Towing Co. Applications, 260 I.C.C. 814 26
Orin Shepard Application, 260 I.C.C. 810 26
Orrell Contract Carrier Application, 250 I.C.C. 67 .....25, 26
Payment for Leased Motor Vehicles on Cotton, 276 I.C.C. 675 58
Pioneer Towing Co. Applications, 260 I.C.C. 814 27
Portland Tug & Barge Co. Contract Carrier Application, 260 I.C.C. 817 26
Shaver Transportation Company Application, 250 I.C.C. 812 26
Southern Transp. Co. Contract Carrier Application, 260 I.C.C. 129 26
Stevens v. *The White City*, 285 U.S. 195 .....16, 30
Tacoma Tug & Barge Co. Application, 260 I.C.C. 815 27
Terrebonne Towing Co., Inc.—Exemp., Secs. 302(e), 303(h), 260 I.C.C. 551 31
Texas & P. Ry. Co. v. *Gulf, C. & S. Ry. Co.*, 270 U.S. 266 40
Tidewater Transp. Co. Common Carrier Application, 260 I.C.C. 30 26
Union Barge Line Corp. Applications, 260 I.C.C. 563 31
United States v. *American Sheet & Tin Plate Co.*, 301 U.S. 402 54
United States v. *American Trucking Ass'ns.*, 310 U.S. 534 .....14, 46
United States v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 14
United States v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 ..10, 12, 39, 40, 43
United States v. *Hancock Truck Lines*, 324 U.S. 774 59
United States v. *L. A. Tucker Lines*, 73 S. Ct. 67 .....37, 38, 59
United States v. *Northern Pacific Ry.*, 288 U.S. 490 27
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 .....11, 12
United States v. *Rock Island Motor Transit Co.*, 340 U.S. 419 .....48, 53
United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 .....22, 34, 37, 42, 46, 47, 48, 50, 51, 53
United Truck Lines v. *Interstate Commerce Commission*, 343 U.S. 830 .. 14
Upper Mississippi Towing Corp., Com. Car. Applications, 260 I.C.C. 85 .. 26
Warner v. *United States*, 97 F. Supp. 580 .....12, 43
Warner v. *United States*, 341 U.S. 907 12
Washington Tug & Barge Co. Applications, 260 I.C.C. 814 27
Western Transportation Co. Applications, 250 I.C.C. 807 26

Page

Westport Towboat Company Contract Carrier Application, 260 I.C.C. 812 26
Willamette Tug and Barge Company Common Carrier Application, 250 I.C.C. 818 26

STATUTES:

Administrative Procedure Act of June 11, 1946, 60 Stat. 237:
Section 8(b), 5 U.S.C. 1007 ..... 9, 59
Section 11, 5 U.S.C. 1010 38
Interstate Commerce Act:
Section 304, 49 U.S.C. 904 ..... 40, 50
Section 304(c), 49 U.S.C. 904 (c) 40, 41, 49
Section 309, 49 U.S.C. 909 ..... 2, 15, 17, 40, 43, 49
Section 309(a) 49 U.S.C. 909(a) 49, 50
Section 309(c) 49 U.S.C. 909(c) 49, 50
Section 309(d) 49 U.S.C. 909(d) 41, 44, 48, 49, 50
Section 311, 49 U.S.C. 911 49
Section 312, 49 U.S.C. 912 52
Section 314, 49 U.S.C. 914 54

MISCELLANEOUS:

Code of Federal Regulations, Title 49 Part 306 52
General Rules of Practice before Interstate Commerce Commission (1942), 49 C.F.R. 1.101(c) 4, 18, 22, 34; 35, 37, 38, 51

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Appeal From The United States District Court for The Northern District of New York.

BRIEF ON BEHALF OF CORNELL STEAMBOAT COMPANY, APPELLEE.

OPINION BELOW

The opinion of the District Court (R. 59) is reported in 107 F. Supp. 184 (September 15, 1952). It upholds the decision of Division 4 of the Interstate Commerce Commission (R. 22) of October 18, 1951 (285 I. C. C. 75), affirmed on petition for reconsideration by the entire Commission on March 17, 1952 (R. 1).

JURISDICTION

The final judgment of the District Court was entered on September 15, 1952 (R. 71). The petition for appeal was presented and allowed on November 13, 1952 (R. 74). The jurisdiction of this Court is conferred by 28 U.S.C.A. Sections 1253, 1336, 1398, 2101(b), 2284, 2321-2325, 49 U.S.C.A. Sections 17(9) and 916(a). Probable jurisdiction was noted on February 2, 1953 (R. 80).

PRELIMINARY STATEMENT

Appellee, Cornell Steamboat Company, is limited in a certificate issued by the Interstate Commerce Commission to it to operation by water on the Hudson River by towage.* Such certificate was granted under the "grandfather" provisions (section 309) of the Interstate Commerce Act, this carrier having been found engaged in the towage business on and since "grandfather" date. In fact, it has been in the towage business for a period of 115 years (R. 60).

On the other hand, the certificate issued to appellant in 1948, which carried forward the same terms as those in the certificate of its predecessor (Hutton) issued in 1944, and which was authorized to be transferred in 1947 (R. 56) contained no reference to the performance of "towage" service and limited the carrier to operation "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" in the transportation "of commodities generally" between points indicated on the Hudson River (R. 57).

Such specification was well recognized prior to the time of the Hutton certificate of 1944, the authorized transfer of 1947, and the certificate of 1948 as the specification of a service, commonly known as "freighting", which is a dif-

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*The operation authorized was "by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light," between various points on the Hudson River. *Cornell Steamboat Co. Contract Carrier Application*, 250 I.C.C. 577 (R. 30).

ferent service from towage and which does not include authority to perform towage.

It is to be noted that the certificate in authorizing "the transportation of commodities generally" specifies that this is to be performed (a) "by self-propelled vessels", namely, vessels having their own power and carrying the commodities on board, and (b) by "non-self-propelled vessels", which likewise would have commodities carried on board but would be different from the self-propelled vessels in that they would obtain their power through incidental and separate power boats, or as stated in the certificate the power would be furnished "with the use of separate towing vessels" (R. 57). The certificate does not provide, as in general towage cases that the service is to be "by" tugboat or towing vessel in the performance of towage. The language of the certificate itself, contrary to the contention now made by appellant and in accord with the view previously admitted by it, provides for freighting and not towage.

The 1944 certificate to Hutton and the 1948 certificate to appellant, carrying forward the terms of the 1944 certificate, were made pursuant to the "grandfather" provisions of the Interstate Commerce Act. The certificate was limited to freighting, since this was the type of service performed during the crucial "grandfather" period by means of "self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels". The certificate gave the carrier what it was entitled to receive and no more.

The 1947 authorization by the Commission of transfer of rights under the 1944 Hutton certificate (with an exception as to territorial scope not material here) to appellant was pursuant to the agreement of the latter to purchase such rights for the sum of only $2,750 (R. 17). There was no contention in that case that at the time of such transfer, appellant thought it was acquiring towage rights or was entitled to anything more than freighting rights which

had been based on service performed in the "grandfather" period. The contention is made by appellant in this Court at this late date that the 1947 report of the Commission may be construed to indicate that general towage rights were included but this overlooks admissions made at the hearing and the terms of the certificate itself. The small consideration itself was some indication of the limited rights sought to be, and actually, acquired.

Appellant, prior to acquiring the Hutton rights in 1947, had not operated as a water carrier subject to the Act. Its principal business was that of producing stone and other products (R. 28). Its private business, it is believed, thus placed it in a particularly formidable competitive position.

Neither the 1944 Hutton certificate nor the 1948 certificate to appellant was to become effective immediately. As to the former a period of more than two and a half months before the effective date was provided (R. 14) and as to the 1948 certificate, a period of a month and a half before the effective date (R. 58). Under the Commission's Rules of Practice the period for reconsideration by the entire Commission of a decision granting an application in whole or in part is 30 days. In spite of the implied lack of opportunity relied upon in appellant's brief, the fact is that ample opportunity was afforded Hutton.

Neither Hutton nor appellant made any objection or filed any petition challenging in any way the 1944 certificate or the 1948 certificate, within the period provided for in the certificates or under the Commission's Rules of Practice. Nor was there any objection taken within the time allowed in the transfer case but instead there was vigorous contention by appellant that the 1944 certificate could not be attacked collaterally and should stand (R. 26). The terms were thus not only consented to but were insisted upon.

Appellant apparently recognizing that its certificate did not permit "towage" as distinguished from "freighting" authorized in its certificate, filed a tariff with the Commission providing for rates on various commodities, with

allowances to shippers in connection with barges furnished by them. By this device and by a sharp reduction in the net rates on brick (the regular rates less allowances) appellant undercut the towage rates of Cornell, appellee, and succeeded in diverting business amounting in one year to a revenue loss of over $250,000 (R. 65, Tr. 141, 142).*

On complaint by Cornell to the Commission that appellant was thereby performing an unauthorized and unlawful towage service not permitted by appellant's certificate, the latter filed a petition for interpretation with the Commission. There is no indication of any claim by appellant in the petition that it was entitled to towage rights. The contention appeared to be that under its freighting rights the allowance practice could be justified. As late as the hearing in the case before the Commission on February 23, 1951, on Cornell's complaint and appellant's petition, appellant through counsel admitted that its operating rights were limited to freighting and did not include towage. (See quotation, *infra*, page 23)

In the original brief filed by appellant with the Commission on April 13, 1951,** following the hearing just mentioned, there is no contention that appellant's certificate is invalid in any respect. The contention was that "the only question for determination in this proceeding is whether or not the Callanan Company has exceeded the authority of its certificate and the answer to that question must be found in the language of the certificate and not elsewhere" (p. 18).

Later by exceptions brief, dated June 18, 1951, following an adverse report by the hearing examiner, appellant for the first time made the contention that the certificate itself was invalid to the extent that it contained any specification of the service to be rendered as a water carrier

* The testimony before the Commission is not printed but by stipulation may be referred to (R. 79).

** This document is not printed but may be referred to by either party under the stipulation (R. 79).

(p. 22). It also contended that even if its certificate were not invalid in this respect, it did not preclude the performance of the service under the allowance practice complained of. There was no contention that the 1944 certificate was a revocation of the 1942 certificate. A reply brief was filed by Cornell on July 12, 1951, to appellant's exceptions.*

Thereafter, on July 20, 1951, appellant filed with the Commission another petition for the first time making the point that the Hutton certificate of 1944, which included a specification of equipment to be used in performing the service authorized, should be annulled as an improper revocation of the original Hutton certificate of 1942 which contained no such specification; and that the 1942 certificate should be restored. A reply was filed by Cornell emphasizing the fact that it was too late under the Commission's rules to make such contention and that it was otherwise without merit. The petition was denied by order of the Commission, dated July 7, 1952.**

The Commission by Division 4 issued its report and order, dated October 18, 1951, here under attack (R. 22). It overruled appellant's contentions and concluded that appellant "has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32). More specific findings will be referred to later. As above indicated, the Commission also by its order of July 7, 1952, denied appellant's petition to have the Hutton certificate of July 17, 1942, restored and the 1944 certificate annulled.

The United States District Court for the Northern District of New York, Circuit Judge Clark, Chief Judge Brennan and District Judge Foley sitting, concluded in an opinion by Circuit Judge Clark that the Commission had acted within its authority, that judgment should be entered for

* The exceptions brief and reply brief are not printed but by stipulation may be referred to (R. 79).

** The petition, reply and order are not printed but by stipulation may be referred to (R. 79).

the defendants, and that the action should be dismissed on the merits (R. 59-71).

There is no contention by appellant that it has been denied a fair hearing, that any alleged constitutional rights have been infringed, or that the underlying findings in the Commission's report are not supported by the evidence before the Commission.

As stated by the District Court "there is substantially no conflict as to the basic facts" and "the issue arises as to the law applicable". Fundamentally, as the Court points out, appellant, holding a certificate of public convenience and necessity for "freighting" is endeavoring to extend this to include "towing" on grounds which the hearing examiner, Division 4, the entire Commission and the District Court have concluded to be clearly without merit.

QUESTIONS PRESENTED

Appellee, Cornell Steamboat Company, is vitally concerned with the questions in this case. It believes that appellant, although acquiring a certificate known to be, and actually, limited to freighting (by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels) in the transportation of commodities generally and not authorizing the performance of towage, the service to which Cornell is restricted in its certificate, nevertheless seeks by the allowance tariff here in question and a belated attack on its predecessor's certificate unjustly to expand its operating rights beyond those to which it is, or was entitled under the "grandfather" clause or under the transfer of rights to appellant, and thus to invade the field of towage not contemplated or authorized by its certificate, with severe injury to Cornell.*

* The District Court in concluding, as did the Commission, that the service performed by Callanan under the allowance device above mentioned was and is actually towage, not authorized by its certificate, stated (R. 64):

> "In fact it is because of this operation [by Callanan] and rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year". (I.C.C. transcript of testimony, pp. 141, 142).

More specifically it is believed that the following questions are here presented:

(1) Is this a case in which the Commission's findings and conclusions are to be considered in the light of the broad discretion conferred upon it under the Interstate Commerce Act and can they be set aside without a clear showing that its authority has been exceeded or its discretion abused?

(2) Assuming the validity of appellant's 1948 certificate and the 1944 certificate on which the latter is based, are not the terms of such certificate such as to exclude towage and is not appellant's contention of an alleged unauthorized incorporation by reference of Commission classifications of carriers without substance?

(3) Timely objection not having been taken by appellant to the 1944 certificate of its predecessor (Hutton), to the 1947 report and order permitting transfer of the 1944 Hutton rights to appellant, and to the 1948 certificate which was its original and only certificate, was it not too late to attack the validity of the 1944 certificate 7 years after its effective date, the transfer order 4 years after entry thereof, and the 1948 certificate, 3 years after issuance thereof?

(4) Also even if, contrary to the fact, appellant's contention is not too late, is not the Commission justified in holding that it is not automatically barred from specifying in the certificates issued the general types of equipment and the services to be performed, and thus is not to be compelled to tear down its long-established system of water carrier regulation?

(5) Even if, contrary to the fact, appellant's contentions were not too late, was not the Commission justified on the merits in refusing to upset the clarifying order of 1944 as an alleged unauthorized revocation of the 1942 certificate, when the 1944 certificate, the 1947 transfer of rights under the 1944 certificate, and the 1948 certificate, limiting appel-

lant to freighting and not including towage, were not objected to, but were instead consented to, and insisted upon and constituted independent determinations?

(6) Is not the Commission justified in finding that appellant's operation under its allowance tariff amounts in fact to towage and that such towage being unauthorized the allowance practice is unlawful?

(7) Is not the claim of appellant as to alleged failure by the Commission to set forth findings and conclusions in compliance with section 8(b) of the Administrative Procedure Act too late when made after conclusion of the proceeding before the Commission and is it not otherwise without merit?

Each of these questions, it is believed, should be answered in the affirmative.

ARGUMENT

I. THE COMMISSION IS VESTED WITH BROAD DISCRETION TO ADMINISTER THE WATER CARRIER PROVISIONS OF THE INTERSTATE COMMERCE ACT IN PROMOTING A SOUND TRANSPORTATION SYSTEM AND PROTECTING THE PUBLIC INTEREST.

Congress in 1940 added water carriers to the types of carriers which had previously been subjected to regulation under the provisions of the Interstate Commerce Act. Important among the regulatory provisions with respect to water carriers were those authorizing the Commission to deal with rates and to regulate competition in the public interest by the issuance of certificates of convenience and necessity to water carriers which on January 1, 1940, the "grandfather" date, and thereafter had shown themselves to have been in bona fide operation and to carriers which could show as to proposed new operation that public convenience and necessity required service by them and that they were qualified to perform such service.

The convenience and necessity provisions of the Act have long applied to railroads and motor carriers. The provisions as to water carriers follow generally those applicable to motor carriers both as to "grandfather" applications and applications as to new services. As later pointed out this Court has referred to what appears to be a somewhat more liberal purpose under the statute in the issuance of certificates to water carriers than to motor carriers but it is not believed that the basic theory and purpose of the convenience and necessity provisions are different with respect to water carriers from those applying to motor carriers under the Act.

It appears appropriate here to point out the language of this Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), in which it sustained a water carrier certificate of convenience and necessity (p. 241):

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 S. Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies".

The *Parker case* cited was a motor carrier case and indicates the similar purposes underlying the motor carrier and water carrier certificate sections of the Act.

Clearly the mere filing of a complaint by appellant does not make the Commission's order here under consideration "suspect" but instead places upon appellant the heavy burden to show invalidity. In *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944) this Court

upheld a rate order of the Commission, saying, among other things (512, 513):

> "'Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences'. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 288."

A leading case as to the Commission's broad discretion and the limited scope of court review is *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946), sustaining an order of the Commission authorizing certain motor carrier extensions under the convenience and necessity provisions of the Act. There the Court said (535, 536):

> "It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest'. This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942), a rate case in which the narrow scope of judicial review is emphasized and the statement is made (p. 546):

> "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems"

In *Warner* v. *United States*, 97 F. Supp. 580, 583, (1950), affirmed per curiam by this Court, 341 U.S. 907 (1951), a Three-Judge Statutory Court upheld an order of the Commission against attack by a water carrier that its operating authority had been unduly restricted as to future "freighting operations", "towing operations", and certain other operations. The broad scope of the Commission's discretion and the limited extent of review were therein pointed out.

The lower Court in the present case stated that it agreed "with the Commission's assertion of power to make the classification in question", limiting appellant to freighting and excluding it from towing in accordance with "grandfather" services shown. The Court continued (R. 70):

> "We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence."

The Court then cited *United States* v. *Detroit & Cleveland Nav. Co., supra; United States* v. *Pierce Auto Freight Lines, supra,* and *Alton R. Co.* v. *United States,* 315 U.S. 15 (1942).

In the background of these familiar decisions as to Court review of Commission orders, it is believed unmistakably clear that the order here under attack is valid and the Court below should be sustained.

II. APPELLANT'S CONTENTION THAT ITS CERTIFICATE MAY PROPERLY BE CONSTRUED TO INCLUDE TOWAGE AND THAT THERE HAS BEEN AN IMPROPER ATTEMPT TO INCORPORATE BY REFERENCE IN THE CERTIFICATE A CARRIER CLASSIFICATION OTHER THAN TOWAGE IS FALLACIOUS.

The contention of appellant here considered, unlike the contentions dealt with in parts III, IV and V of this brief, is based on the assumption that its present certificate and the provisions thereof are valid. Its contention is that the certificate by its terms is broad enough to authorize towage and that the Commission's view to the contrary is erroneous. In support of its contention it resorts to the theory that the Commission in concluding that towage is not authorized by the certificate has improperly incorporated by reference a carrier classification assumed to be elsewhere made by the Commission.

Appellant's contention is fatally infirm in disregarding (a) the great weight to be attached to the Commission's interpretation of its own certificates, (b) the history of the certificate, including the clarifying amendment of 1944 patterning the authority to embrace the only service (freighting) to which appellant was shown to be entitled under the "grandfather" clause, (c) the admissions by appellant that it knew its certificate did not include towage, (d) the well-recognized meaning of the certificate in the light of other decisions prior to the issuance of the certificate to appellant, and (e) the absence of alleged incorporation by reference into appellant's certificate but instead a clarifying amendment in 1944 in effect excluding towage.

(a) Great Weight is to be Attached to the Commission's Interpretation of its Certificate and this is True as to its Conclusion that Towage is Not Authorized by Appellant's Certificate.

In view of the important duties and responsibilities placed upon the Interstate Commerce Commission by Congress in respect to the administration of the Interstate Commerce Act and the effectuation of the National Transportation Policy, great weight should properly be accorded the interpretation by the Commission of certificates of convenience and necessity issued by it.

In *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817, (certiorari denied 342 U.S. 830), the Court of Appeals for the Ninth Circuit upheld an interpretation by the Commission of a motor carrier certificate as to "off-route" points. The Court said (p. 817):

> "The Commission appears to have no formal rule or regulation defining the term 'off-route-point'. However, in many decisions passing on applications for operating rights the Commission has restricted the term to points reasonably close to the carrier's regular route. * * * The general practice of the Commission thus supports its restricted interpretation of the present certificate".

Then emphasizing the rule to apply in the construction by the Commission of certificates granted by it, the Court said:

> "The Commission's construction of its certificates, unless clearly wrong or arbitrary, is to be accepted by the courts. Adirondack Transit Lines, Inc. v. United States, D.C., 59 F. Supp. 503, affirmed 324 U.S. 824, 65 S. Ct. 688, 89 L. Ed. 1393".

See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489, 490 (1942). In *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549 (1940) it was

said that the Commission's interpretations of the Act "are entitled to great weight".

There can be no doubt that in the present case the Commission has deliberately concluded that appellant's certificate does not authorize towage and that it "has been and is performing the service of towage without appropriate authority therefor under section 309 of the Act * * *" (R. 32).

The Commission in its report here under attack referred to Cornell's complaint that while it in its certificate is limited to a "mere towage service", appellant is restricted by its certificate to the transportation of property by self-propelled vessels and "by non-self-propelled vessels with the use of separate towing vessels (commonly referred to as freighting)" and that the performance of towage was an unauthorized operation in violation of the law (R. 28). The Commission further said (R. 30):

> "Its [Cornell's] certificate to operate as a common carrier by water is limited to that service [general towage] only, while the petitioner's certificate, as above indicated, is limited to the performance of freighting service by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. The transportation of property by a water common carrier by non-self-propelled vessels with the use of separate towing vessels, for the purpose of the voyage, is in effect service by one vessel or unit under the contract of affreightment. The service performed by towers falls within a classification distinguishable from that just mentioned. They propel vessels from place to place and, unless the transportation is exempt, are subject to our jurisdiction under part III. See *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634. The authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities by non-self-propelled vessels with the use of separate towing vessels".

The Commission analyzed the service performed by appellant under the allowance tariff here in question and con-

cluded that the service was in fact a towage service (R. 32). It therefore found, as indicated above, that such service was performed "without appropriate authority therefor" (R. 32).

The District Court aptly points out that the distinction between freighting and towage has long been recognized in Court cases, citing *Stevens* v. *The White City*, 285 U.S. 195, 200 (R. 61).

No reason has been shown by appellant to justify overturning this careful interpretation of appellant's certificate.

(b) The History of Appellant's Certificate, Including the Clarifying Amendment of 1944 Patterning the Authority to Include Service by Freighting and Not Towing in Accordance with the Service to Which it was Entitled Under the "Grandfather" Clause Shows the Fallacy of Appellant's Contention Here.

In considering the history of appellant's certificate it is believed important to bear in mind particularly—

(1) the original certificate of July 17, 1942, to Joseph R. Hutton, appellant's predecessor in interest (R. 6-10) (250 I.C.C. 804),

(2) the amended certificate of March 7, 1944 to Hutton (R. 11-14) (260 I.C.C. 804),

(3) the order, dated August 18, 1947 (265 I.C.C. 813), authorizing the transfer of part of the operating rights covered by the amended certificate of 1944 from Hutton's administratrix to appellant (R. 15-22), and

(4) appellant's certificate dated February 5, 1948, pursuant to the order of transfer (R. 27, 56).

(1) **Original Hutton certificate of July 17, 1942.** This certificate to appellant's predecessor in interest certifies "That public convenience and necessity require operation

by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points" on the Hudson River below its junction with the New York State Barge Canal, and on the New York State Barge Canal and certain waters connecting therewith (R. 9, 10). It was ordered in the certificate "That said applicant be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission" (R. 10).

The certificate, it is to be noted, contains no provision as to the type of equipment to be used in rendering the service authorized or mention of any type of service to be permitted. The certificate, however, is based on a showing of past operation under the "grandfather" provision of the Interstate Commerce Act (section 309, 49 U.S.C.A. section 909). A certificate under this clause must be based on a showing of bona fide operation on and since the "grandfather" date, January 1, 1940.

The certificate incorporates by reference the Commission's report of the same date (R. 9). This report shows the type of operation which the carrier performed in the crucial "grandfather" period (R. 7):

> "Applicant [Joseph R. Hutton] had been in operation for 37 years. He owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are *operated as a unit*. The power boat is used to tow the barges but also carries about 150 gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet". (Emphasis supplied)

The report further shows that during the 1939 and 1940 seasons 13 commodities (not including bricks) were transported by Hutton within the territorial limits referred to in the certificate.

It is significant that the operation thus found as the basis for the "grandfather" certificate (the finding being included by reference in the certificate) is that there were 1 power boat and 4 barges "all of which are operated as a unit". This service with its own barges is the conventional "freighting" service as distinguished from towage. The renting or chartering of barges for operation in Hutton's fleet also confirms the character of service of freighting and not towage. The report contains no mention of towage services performed in moving shippers' barges or of any allowance arrangement providing for any payments to them. The case was uncontested (R. 7).

(2) **The clarifying certificate of March 7, 1944 to Hutton.** By its certificate of this date, described as an "Amended Certificate", the Commission cancelled the original certificate of July 17, 1942. This amended certificate contained changes from the provisions of the original 1942 certificate in that it specified the type of vessels to be used. As previously indicated, the original certificate contained no such specification.

In the report accompanying the order and made a part thereof the Commission pointed out that in the prior report the type of vessels to be used had not been specified and that "We have, therefore, reopened this proceeding upon our motion for the purpose of giving further consideration to this matter".

Apparently appellant seeks to paint this reopening on the Commission's own motion as in the nature of an arbitrary exercise of power. It fails to point out that by the very terms of the certificate, dated March 7, 1944, it was not to take effect and be in force until May 29, 1944, and that under the Commission's Rules of Practice the applicant had ample opportunity to request reconsideration within a period of 30 days after such order. There was no attempt to seek reconsideration or challenge the amended certificate within the time provided. The reason appears

obvious. The amended certificate and order gave the applicant exactly what he was entitled to receive under the "grandfather" clause, namely, authority to perform freighting by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels—a service which he had been performing during the "grandfather" period and which he was entitled to continue under the "grandfather" clause.

In indicating its reasons for specifying in the amended certificate the general types of equipment which might be used under the certificate, the Commission said (R. 12):

> "In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date. He would thus be in a position to enter into new fields of transportation without first establishing, in accordance with the provisions of the Interstate Comerce Act, that such extension of his services is required by the present or future public convenience and necessity or is consistent with the public interest and the national transportation policy declared in the act. For these reasons we will modify the authority previously granted by specifying the types of vessels operated by applicant on and since January 1, 1940".

As later pointed out, it was well recognized in other decisions of the Commission that such specification of equipment for use in the transportation of commodities generally, and without express reference to the authorization of towage, indicated the authorization of a freighting service only. From the language quoted above as to excluding applicant from extending its operation without a showing of public convenience and necessity, it is difficult to conceive of any further service except towage that could have been within such purpose, and such service is clearly excluded.

It is to be noted that the Commission in its report accompanying the 1944 amended certificate describes the operation during the critical "grandfather" period in almost the same words as in the original 1942 report (R. 12). The Commission found under the "grandfather" clause (R. 12):

> "Upon reconsideration, we find that on and since January 1, 1940, Joseph R. Hutton has been engaged in operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in [the area indicated in the certificate]".

The 1944 amended certificate and order certified (R. 13):

> "That public convenience and necessity require the conti nance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in" [the area set forth in the certificate, this area being the same as in the original certificate].

It was then ordered that the carrier be "authorized to continue operation as specified above * * *".

As indicated, Hutton had no just claim to authority to perform towage, because such service had not been performed in the "grandfather" period. He made no contention that he should have such authorization. The time for filing a petition for reconsideration expired before the amended certificate became effective on May 29, 1944, and no such petition was filed. Under the circumstances Joseph R. Hutton, appellant's predecessor in interest, must as a matter of law be deemed to have consented to the amended certificate and order and the limitation therein to freighting, namely, transportation "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels."

(3) The order, dated August 18, 1947, authorizing the transfer of part of the operating rights covered by the amended certificate of 1944 from Hutton's administratrix to appellant. By this order, and the report accompanying it of the same date, the Commission authorized "transfer to The Callanan Road Improvement Company [appellant] of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton" in so far as the certificate authorizes operation on the Hudson River only (R. 21, 22). The Commission stated that upon receipt of certain information of confirmation of the sale, "a certificate superseding the amended certificate will be issued to the transferee" (R. 21).

It is to be noted that there was no reference to any transfer of rights which might be claimed under the 1942 certificate and that the transfer was as to rights under the 1944 amended certificate. The 1942 certificate, as previously pointed out, had been cancelled.

The 1944 certificate contained no reference to towage service but authorized only a freighting service. In the *transfer case* there was no suggestion by appellant that it expected to perform a towage service and there was no objection that the rights to be transferred under the 1944 certificate were subject to a specification of types of equipment and service. The same counsel appeared for appellant in that case as the case here under consideration (R. 14).

The purchase price, as previously noted, was only $2,750. The consideration would seem to indicate that the rights acquired were not the all-inclusive ones here claimed. No attempt was made by appellant to contest the order of the Commission in the *transfer case* or file a petition for reconsideration.

However, as indicating that appellant was satisfied with and consented to the freighting rights authorized to be transferred to it under the 1944 Hutton certificate, it is to be noted that appellant strenuously objected in the *transfer case* to a protest by a water carrier association seeking to

have the certificate changed to exclude operation by "self-propelled vessels." Appellant through its counsel urged (R. 20):

> "that the certificate may not be attacked collaterally in this proceeding, and * * * that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States v. Seatrain Lines, Inc.*, 329 U.S. 424".

This indicates that appellant not only consented to the terms of the amended certificate authorized to be transferred, including the provision for freighting, but insisted upon the terms of that certificate.

(4) **The certificate and order of February 5, 1948, to appellant pursuant to authorization in the transfer case.** Following the order of August 18, 1947, authorizing transfer of rights to appellant under the 1944 Hutton certificate, to the extent of operations on the Hudson River, the Commission on February 5, 1948, issued its certificate and order (referred to as its Second Amended Certificate and Order) which was the first and only certificate which had been issued to appellant (R. 56). The certificate carries forward the same provisions as to freighting service contained in the amended certificate of March 7, 1944, namely, "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points" on the Hudson River (R. 57).

While the date of this certificate was February 5, 1948, it was by its terms not to become effective until March 19, 1948, a month and a half later. No objection was made by appellant or by any one else to the terms of such certificate and no request for reconsideration or review was made, within the time provided for in the certificate or under the Commission's Rules of Practice.

The above facts as to the Hutton certificate, the transfer order, and appellant's certificate point clearly to the correctness of the Commission's finding that appellant has operating rights under its certificate to perform freighting only and not towage.

(c) By its words and actions appellant has admitted that it knew the certificate granted to it authorized only freighting rights and did not include authority to perform towage.

Admission by appellant at the hearing that its certificate does not authorize towage but permits freighting service only is significant. As late as the hearing on February 23, 1951, in the proceeding which resulted in the order here under attack, the following admission was made by counsel for appellant (I.C.C. tr pp. 9, 10) :*

> "Mr. Curry [counsel for Cornell]: It is my understanding that it is admitted by the petitioner [appellant] that the amended certificate which it has received under this transfer authority does not include the right to perform towage.
>
> Mr. Wilson [counsel for Callanan]: That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.
>
> Mr. Curry: That is my understanding. Thank you.
>
> Exam. Konigsberg: And it is your position that that type of service performed is not towage but freightage?
>
> Mr. Wilson: That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth".

This admission not only confirms the fact that appellant's certificate authorizes freighting only and does not permit towage, but it clearly indicates that appellant knew this to

* The transcript of testimony is a part of the record in this Court and is covered by stipulation as to its use (R. 79).

be true when it acquired the freighting rights under the authorization of the transfer order of 1947 above referred to. As above noted the same counsel was in the *transfer case* as in the present case.

The filing by appellant of an application for temporary authority to perform towage was an admission that it had no such authority under its existing certificate. The fact that such request for temporary authority was filed by appellant with the Commission and that such request was denied, is set forth in the Commission's report in the present case (R. 29).

Appellant's attempt to have the Commission approve the transfer of towage rights to it from another carrier and its application for a permanent certificate to perform towage indicate admissions of absence of towage authority under its existing certificate. While appellant has claimed that the filing of such application was not an admission by it but a precautionary measure the fact that the applications were filed and were pressed indicates not only a lack of confidence in the claim here made of towage authority under the existing certificate but is evidence that it knew it had no such authority.*

The resort by appellant to the allowance device here in issue is an admission that it had no towage rights. If appellant really had towage rights under its present certificate, it seems highly strange that it did not publish a simple towage tariff, rather than to resort to the roundabout scheme of allowances to shippers furnishing their barges. Apparently the allowances were conceived with the thought that they might be justified under the authority to perform freighting only.

The above admissions by appellant, through words or actions, confirm the conclusion of the Commission that

* As the District Court points out these applications were denied (R. 66; 285 I.C.C. 137). These circumstances emphasize the unjustness of appellant's attempt by the strained reasoning relied upon here to expand its certificate to cover services (towage) which it is not certified to perform and which it cannot justify by a showing of public convenience and necessity.

appellant's certificate does not include towage service, but is limited to freighting.

(d) The distinction between freighting and towage was well recognized in decisions of the Commission prior to the 1944 Hutton certificate, the 1947 transfer order, and the 1948 certificate issued to appellant, and such decisions confirm the absence of towage authority in appellant's certificate.

The distinction between freighting and towage has long been recognized in decisions of the Commission. "Freighting" as distinguished from "towage" is well established by decisions of the Commission and was well known prior to the issuance of the amended certificate of March 7, 1944 to Hutton. As previously noted, the Commission in specifying in the 1944 certificate the general types of equipment which could be used and the service which could thereby be performed (freighting) pointed out that this was done in order that the service authorized might conform to the service shown to have been rendered during the critical "grandfather" period.

Otherwise, the carrier, in the language of this Court in motor carrier "grandfather" cases, would have been able "to enlarge and expand [its] business beyond the pattern which it had acquired" prior to "grandfather" date and would have been able to bring about "a metamorphosis" not sanctioned by the Act. Instead the "grandfather" clause should be utilized to preserve "the position which the carrier had obtained in the nation's transportation system". See *Noble* v. *United States*, 319 U.S. 88 (1943), *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943), and *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942).

From the very beginning the Commission recognized towage as a separate service. The first reported decision involving towage after the passage of the 1940 water carrier amendment was the *Orrell case*, 250 I.C.C. 67, which

was decided on October 30, 1941, long before the original Hutton certificate of July 17, 1942. In the *Orrell case* the certificate was issued to it as a common carrier "by tugboats in the performance of general towage". Another early case was the *John L. Goss case*, 250 I.C.C. 101, decided November 10, 1941, where the certificate authorized applicant to operate as a common carrier "by tugboats, * * * in the performance of general towage".

The certificate of this appellee (Cornell) restricts it to operation "by towing vessels in the performance of towage".

The distinction between this service and freighting is clearly indicated by the fact that in numerous decisions before the Hutton 1944 certificate, the Commission issued certificates authorizing transportation of commodities (a) "by non-self-propelled vessels with the use of separate towing vessels" and (b) "by towing vessels in the performance of general towage". These cases included *Tidewater Transp. Co., Common Carrier Application*, 260 I.C.C. 30 (1943), affirmed in *Inland Navigation Co. v. United States*, 76 F. Supp. 567 (1948), *James McWilliams Blue Line, Inc., Com. Car. Application*, 260 I.C.C. 15 (1943), *Upper Mississippi Towing Corp., Com. Car. Applications*, 260 I.C.C. 85 (1943), *Southern Transp. Co. Contract Carrier Application*, 260 I.C.C. 129 (1944).*

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*Other decisions by the Commission (not printed in full) which were made prior to the March 7, 1944 amended certificate, above mentioned, and which provided for both "freighting", namely, transportation of general commodities by non-self-propelled vessels with the use of separate towing vessels, and towage, by tugboats or towboats, because, unlike the present case, the "grandfather" operation, or a showing of public convenience and necessity, included both, are the following: *Columbia Tug Boat Co.*, 250 I.C.C. 819 (Aug. 10, 1942); *Knappton Towboat Co.*, 250 I.C.C. 812 (Dec. 29, 1942); *Coyle Lines*, 250 I.C.C. 820 (Mar. 9, 1943); *Shaver Transportation*, 250 I.C.C. 812 (May 10, 1943); *Willamette Tug and Barge Co.*, 250 I.C.C. 818 (June 2, 1943); *Western Transportation Co.*, 250 I.C.C. 807 (June 12, 1943); *Delta V. Smyth*, 250 I.C.C. 817 (June 23, 1943); *Olson Tug Boat Co.*, 260 I.C.C. 814 (July 3, 1943); *Westport Towboat Co.*, 260 I.C.C. 812 (July 21, 1943); *Diesel Towing Co.*, 260 I.C.C. 809 (Aug. 11, 1943); *Orin Shepard*, 260 I.C.C. 810 (Aug. 18, 1943); *Olympia Towing Co.*, 260 I.C.C. 814 (Aug. 31, 1943); *Harbor Towing Co.*, 260 I.C.C. 810 (Sept. 4, 1943); *Portland Tug & Barge Co.*, 260 I.C.C. 817 (Sept. 8, 1943); *Atlas Tug Service*, 260 I.C.C. 809 (Sept. 25, 1943); *Ohio River Co.*, 260 I.C.C. 810 (Sept. 29, 1943);

The separate authorization of these two types of services through the specification of equipment used in connection therewith is a clear recognition of the difference between such services and the importance of specifying them so as to avoid improper expansion of operation beyond the scope justified by previous operation in the "grandfather" period and to prevent disruption of the "competitive balance of carriers over the same route" by unauthorized services. *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238; *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed as to this matter, by the entire Commission, 265 I.C.C. 313; and *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78.

Certificates not specifically providing for towage service, as in the present case, do not authorize such service. If, for example, a certificate authorizes the transportation of *commodities* it cannot be assumed that it also authorizes the transportation of *passengers* unless the latter are expressly referred to in the certificate. Likewise, the specification of a freighting service in a certificate, namely, transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" cannot be assumed to include the distinct and different service of "towage" by towing vessels.

Appellant is entirely incorrect in assuming, as it does, that the Commission has ever held that towage is included in authority to perform general transportation (freighting) by non-self-propelled vessels with the use of separate towing vessels. Appellant's confusion is in failing to distinguish the different categories in the Commission's certificates from the question whether in a particular case the

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Tacoma Tug & Barge Co., 260 I.C.C. 815 (Sept. 29, 1943); *Washington Tug & Barge Co.*, 260 I.C.C. 814 (Sept. 29, 1943); *American Tug Boat Co.*, 260 I.C.C. 814 (Oct. 4, 1943); *Pioneer Towing Co.*, 260 I.C.C. 814 (Oct. 22, 1943); *Grizzaffi Motor Co.*, 260 I.C.C. 819 (Nov. 1, 1943); *Blaske Lines*, 260 I.C.C. 813 (Dec. 3, 1943); *Arrow Tug & Barge Co.*, 260 I.C.C. 808 (Feb. 4, 1944); and *Inland Waterways Corp.*, 260 I.C.C. 808 (Mar. 4, 1944).

service is shown to be freighting or towage within the meaning of the certificate.

While the large number of cases decided by the Commission prior to the 1944 Hutton certificate specifying separately freighting and towage services indicate, as above pointed out, that towage services are not to be assumed to be included in a certificate unless specified, the Commission has expressly so ruled, as for example, in *Campbell Transp. Commn Carrier Application*, 260 I.C.C. 107 (1943). In that case the certificate authorized the water carrier to operate "by non-self-propelled vessels with the use of separate towing vessels, in the transportation of commodities generally". There the question was raised as to whether the manner in which the barges of shippers were used by the carrier amounted to a towage service. The Commission said that "Applicant [the carrier] concedes that the service performed by towers falls within a classification distinguishable from that of a carrier of property by non-self-propelled vessels" and that "It takes the position * * * that its own service is that of a carrier of property and not that of a tower".

After analyzing the service in question with a view to determining whether it could be classed within the term "transportation of commodities by non-self-propelled vessels with the use of separate towing vessels" or the term "general towage," the Commission concluded (p. 110):

> "The service to shippers, as described above, is unquestionably towage, within the meaning of 'general towage,' rather than complete freighting service. Authority to perform such towage is not included in the authority granted to water carriers to engage in the transportation of commodities by non-self-propelled vessels with the use of separate towing vessels. Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freight by barges and towboats did not perform such towage service for shippers during the 'grandfather' period. *Carriers whose certificates or*

permits do not specifically authorize the performance of towage are without authority to engage in such service" (Italics supplied).

The Commission earlier in its decision pointed out the injustice of permitting "carriers whose authority is limited to freighting by barges and towboats to invade the field of carriers engaged in the performance of towage" and who are limited in their certificates to the latter service. It said "Carriers that have been granted authority to transport commodities by barges and towboats have been required to show that they were in bona fide operation in the performance of complete freighting service in which they furnished both types of vessels" (p. 109)*.

It appears that the real question in the *Campbell case* was not whether the certificate in providing for freighting could be construed to include towage but whether on the facts as to the actual service there involved such service could be considered as freighting and thus be brought within the scope of the certificate.

Appellant contends that the *Campbell case* constituted a definite departure and a change in policy from an earlier holding in *Eastern Transp. Co. Contract Carrier Application*, 250 I.C.C. 505 (Oct. 19, 1942), where, it contends, the Commission held that special authority to tow shippers barges in the transportation of commodities generally under part III of the Act was not necessary because authority would be granted authorizing the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels.

This indicates a misconception of the *Eastern Transp. Co. case*. The fact is that in the original case (250 I.C.C. 505) the Commission made the point that "Towage is a different service from transportation of commodities in non-

* While the manner in which the barges of shippers were used in that case was found to be towage, as is true in the present case, the Commission pointed out that under certain conditions shippers' barges could be used by a carrier in freighting service but only when as a part of its equipment in performing such complete freighting service" (p. 110).

self-propelled vessels with the use of separate towing vessels" that "Carriers performing towage compete with carriers performing the complete transportation, but upon a different basis" and "If applicant is able to perform the operations alternatively as different transportation services, discrimination would be likely to result". It then said "Proper regulation requires that we restrict the nature of applicant's service to the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels" (p. 508). It thus made plain that the certificate would not permit towage but only freighting. The Commission expressly said that the "portion of the application seeking * * * authority * * * to perform towage will be denied" (p. 509). On reconsideration (250 I.C.C. 635) the carrier objected to the original certificate because it had excluded towage and would require it "to assume the status of carrier of the commodities on the shippers' barges, which status would subject applicant to many more forms of potential liability than were imposed upon it in the past as a tower of shippers' barges" (p. 636).* The Commission on March 6, 1943, modified the previous decision and authorized operation both "by non-self-propelled vessels with the use of separate towing vessels" and "by towing vessels in the performance of towage", since both services had been performed in the "grandfather" period.

Other decisions prior to the 1947 transfer order showed that freighting authority did not include towage. In addition to the numerous cases previously cited which showed the distinction between freighting and towage prior to the 1944 Hutton certificate, there were numerous decisions thereafter but prior to the time of the transfer proceeding of 1947 which were to the same effect. Appellant in that proceeding did not question the 1944 certificate but, as previously noted, insisted that the terms thereof should not be changed.

* Note the lower Court's reference to the well-known differences in admiralty citing *Stevens* v. *The White City*, 285 U.S. 195 (R. 61).

In *Central Barge Co. Applications*, 260 I.C.C 329 (1944) the Commission recognized the two services and authorized operation "by towing vessels in the performance of general towage" in addition to transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" (p. 341). It referred to the *Campbell case*, 260 I.C.C. 107, supra, and affirmed the view that "carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service". To the same effect are *Terrebonne Towing Co., Inc.—Exemp., Secs. 302(e), 303(h)*, 260 I.C.C. 551, 554, and *Union Barge Line Corp. Applications*, 260 I.C.C. 563, 564.

Among the numerous cases recognizing the distinction between towing and freighting is *Colle Towing Co. Applications*, 260 I.C.C. 681 (1946) where transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" is described as "freighting operations" and separate authority is granted to perform such service as towage. Other cases include *Mirene Co. Applications*, 260 I.C.C. 689, (1946), *Cumberland River Sand Co., Inc., Com. Car. Application*, 260 I.C.C. 734 (1946), *Baton Rouge Coal & Towing Co., Com. Car. Application*, 260 I.C.C. 761 (1946), and *American Barge Line Co. Applications*, 260 I.C.C. 783 (1946).

It is no wonder that appellant's counsel admitted at the hearing in the case which is now before the Court that its certificate does not include the right to perform towage (see supra p. 23).

(e) Appellant's contention as to alleged improper incorporation by reference into its certificate disregards the 1944 amendment excluding towage and is unsound.

Appellant apparently lays considerable stress on its theory that the Commission in holding that towage is not authorized by its certificate is resorting to an improper incorporation by reference of the classification of water carriers between those performing freighting services and

those performing towage services, as in the *Campbell case*, supra, and thus adds to the certificate a meaning not there. The argument is that the scope of the certificate is improperly narrowed to exclude the authority to perform towage.

A basic error in appellant's contention, it is believed, lies in the fact that the Commission in 1944 did not merely say that the 1942 Hutton certificate should be construed to exclude towage but by its 1944 Hutton amendment specifically inserted in the certificate the limitation that operation should be "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" * * * in the transportation of commodities generally" and such description and specification was well known at the time, and was intended by the Commission, to mean that a freighting service and not a towage service was thereby authorized. The change was consented to not only by Hutton but by appellant in the transfer proceeding, as hereinbefore shown.

The situation is entirely different from such cases as *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. There a motor carrier certificate authorizing transportation of "general commodities" with certain named exceptions, not including petroleum products in bulk in tank trucks, was claimed by competing truckers to exclude the latter type of transportation. The Commission said that the principal question was whether "the term 'general commodities' includes petroleum products in bulk, in tank trucks" (p. 291). It said "We believe the weight of authority supports the conclusion that the term 'general commodities' in certificates of public convenience and necessity means all types of commodities, except to the extent restricted," (p. 301) and, therefore, held that the transportation complained of was authorized by the certificate. The Commission further said, after referring to a number of its decisions (p. 299):

> "From the foregoing, the only reasonable conclusion that can be reached is that, at and since the time of the

original grant of authority to the defendant, the term general commodities has been considered by the Commission to include all commodities other than those expressly excepted''.

The case supports rather than militates against the decision in the present case. The Commission decisions were and have been clearly to the effect that the description of transportation in the 1944 Hutton certificate and in appellant's certificate means freighting and not towage, and there is no justification for torturing the language into providing for the latter. While complainants in the above case urged that the classification of carriers of ''general freight'' in another case, the *Classification case*, 2 M.C.C. 703, should control the Commission correctly held that it should not.

The *Coastal Tank Line case*, and similar cases relied upon by appellant are utterly inapposite here. Applicant's contention is without merit.

III. ASIDE FROM BEING OTHERWISE UNJUSTIFIED, APPELLANT'S CONTENTIONS AS TO ALLEGED UNAUTHORIZED REVOCATION OF THE ORIGINAL 1942 HUTTON CERTIFICATE AND AS TO CLAIMED UNAUTHORIZED SPECIFICATION OF TYPES OF EQUIPMENT AND SERVICE WERE MADE TOO LATE AND SHOULD THEREFORE BE REJECTED.

The facts in this case, it is believed, show that appellant's contentions as to alleged unauthorized revocation by the 1944 Hutton certificate of the 1942 certificate and as to alleged unauthorized specification of types of equipment and service in appellant's certificate are not only merely exigent afterthoughts but were not made within the time proper under the Commission's rules and are too late.*

* The District Court after referring to the fact that appellant had ''consented or waived objection'' to limitation of the certificates said ''Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell'' (R. 65).

Among such facts are the following:

(1) In issuing the Hutton certificate of March 7, 1944, cancelling the original 1942 certificate and specifying a freighting service as hereinbefore explained, provision was made for a period of over two and a half months after the date of the order before it or the certificate would become effective, and thus ample opportunity was afforded Hutton within which to object to or protest the certificate. Under the Commission's Rules of Practice a petition for reconsideration could be submitted within 30 days after the date of service of the decision or order granting an application in whole or in part (Rule 101(e)). There was no objection by Hutton within the time allowed, and in fact there has never been any objection by him or his administratrix.

(2) In the 1947 transfer proceeding, as previously indicated, the Commission approved transfer by Hutton's administratrix to appellant of operating rights under the 1944 Hutton certificate, except as to those on the New York State Barge Canal. Appellant not only did not object to the terms of that certificate but as the Commission said, concerning the protest of another carrier in that case that the rights transferred should not include the use of "self-propelled vessels" as provided for in the certificate:

> "Counsel for the applicants [Hutton's administratrix and appellant] points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States v. Seatrain, Inc.*, 329 U.S. 424" (R. 20).

The same counsel in that case is counsel in the present case. These circumstances indicate that not only did appellant consent to the terms of the 1944 certificate but that it insisted that they should be left intact.

(3) The certificate of February 5, 1948, which was the first and only one issued to appellant was pursuant to the deci-

sion in the 1947 transfer case. The certificate was not to become effective until March 19, 1948, about a month and a half after the date of issuance and contained the same provisions as the 1944 certificate with respect to types of equipment and service (R. 57, 58). Neither appellant nor any one else objected to this certificate before its effective date or within the time provided for in the Commission's rules.

(4) Following complaint by Cornell to the Commission that appellant was performing unauthorized towage, a representative of the Commission on September 19, 1950, called appellant's attention to the decision by Division 4 in *Dixie Carriers, Inc., Rates & Allowances*, 278 I.C.C. 417, indicating that appellant's service appeared to be unlawful (R. 28). Appellant replied "on September 25, 1950, that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie case* when the order therein became effective" (R. 28). In that case there was no question of revocation or as to the Commission's power to specify types of equipment or services. Appellant in expressing its willingness to be bound by the final decision in that case indicated in effect that it had no complaint such as the contentions now made, as to alleged absence of authority in the Commission to issue the 1944 Hutton certificate and to specify types of equipment and services.

(5) Although indicating that it would conform to the decision in the *Dixie Carriers case* when it should become effective, appellant did not do so but following the effective date of that decision on December 26, 1950, filed a petition with the Commission on January 5, 1951, for interpretation, such petition with the complaint being the basis for the present decision (R. 28, 29). There is no suggestion that the petition contained any claim or contention that the Commission had, without authority, revoked the 1942 Hutton certificate or that there was unauthorized specification of types of equipment or services.

(6) The admissions by counsel for appellant at the hearing before the Commission on February 23, 1951, that its

certificate did not include the right to perform towage have been referred to (I.C.C. tr. pp. 9, 10)*. There was no suggestion that appellant's certificate was improper or invalid in any respect.

(7) In the original brief by appellant, dated April 13, 1951, there is no contention that appellant's certificate is invalid in any respect. The contention was that "the only question for determination in this proceeding is whether or not the Callanan Company has exceeded the authority of its certificate and the answer to that question must be found in the language of the certificate and not elsewhere" (Original (I.C.C.) brief, p. 18).*

(8) Not until the filing of its exceptions brief on June 18, 1951, following an adverse report of the hearing examiner did appellant make the contention that its certificate was invalid to the extent that it contained any specification of the service to be rendered by the water carrier or that there was unauthorized revocation (Exceptions brief, p. 22).*

(9) On July 20, 1951, appellant filed with the Commission another petition making the point that the Hutton certificate of 1944 constituted an unauthorized revocation of the original 1942 certificate. Following a reply by Cornell challenging the contention as made too late and as otherwise without merit the Commission denied the petition by order, dated July 7, 1952.* No petition for reconsideration of this order has been filed by appellant.

Fatal "lack of diligence". The circumstances set forth above unmistakably show the inequitable character of appellant's last-minute attempts, by legal technicalities, in themselves unsound, to escape the just limitations in its certificate, which grants it authority to perform a freighting service of general commodities and not a towage service.

Not until 7 years after the 1944 Hutton certificate became effective, not until 4 years after the order in the *transfer*

* These documents are not printed but may be referred to by either party under the stipulation (R. 79).

case, and not until 3 years after the 1948 certificate to appellant, were the contentions here under consideration made.

As above indicated there was utterly lacking any attempt to challenge the validity of these certificates within the time provided in the Commission's rules. No other conclusion is permissible than that appellant consented to these certificates and the provisions thereof. Such consent is referred to by the Commission in the report here in issue (R. 26), and distinguishes the *Seatrain case*, 329 U.S. 424, supra, in which there was no consent but vigorous and timely objection. That case will be referred to more in detail later.

In *United States* v. *Northern Pacific Ry.*, 288 U.S. 490 (1933), this Court ruled that there was a fatal "lack of diligence" under conditions less compelling than in the present case. There in an attack on an order of the Commission prescribing rates on petroleum its action was upheld in declining to reopen the proceeding to admit evidence of changed economic conditions. The Court said (p. 494):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprive them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order".

In the recent case of *United States* v. *L. A. Tucker Truck Lines*, 73 S. Ct. 67 (1952), the failure to make timely objection was found to be fatal. Although in that case the question, which concerned the validity of a proceeding before the Commission in which the hearing was by an

examiner who had not qualified under section 11 of the Administrative Procedure Act, and the question had first been raised in Court and not before the Commission, the injustice and inequity of such belated attempt to upset the Commission's order were condemned, in the face of a contention that there was a lack of "jurisdiction" on the part of the Commission to make its decision. In the present case the question as to the validity of the Hutton and Callanan certificates was not raised before the Commission until years after such certificates had become final and the period for reconsideration under the Commission's rules had expired. The tardiness of the claim before the Commission is entitled to the same adverse ruling as the late presentation of the hearing examiner question in Court in the *Tucker case*. The following language in that case appears particularly apt here (p. 68):

> "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of consideration of practical justice";

Again the Court said (p. 69):

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice".

In the present case no such objection was made within the time provided under the Commission's Rules of Practice and in addition there was no reason as a matter of "practical justice" why the certificates which actually gave the carrier all it was entitled to receive under the "grandfather" provisions of the Act, should be invalidated in whole or in part. Appellant's contentions are too late and should be rejected.

IV. BESIDES BEING MADE TOO LATE, APPELLANT'S CONTENTION THAT THE COMMISSION IS AUTOMATICALLY BARRED FROM SPECIFYING IN CERTIFICATES THE GENERAL TYPES OF EQUIPMENT AND THE SERVICES TO BE PERFORMED IS ERRONEOUS AND IS AN UNJUSTIFIED ATTEMPT TO TEAR DOWN A LONG-ESTABLISHED SYSTEM OF WATER CARRIER REGULATION.

(a) Appellant's contention runs counter to the fundamental purposes of the "grandfather" provisions of the Act.

While there are some differences in the language of the convenience and necessity provisions of the Interstate Commerce Act applicable to railroads, motor carriers, and water carriers, there can be no doubt that the fundamental purposes are the same.

Where "grandfather" rights are to be preserved there must be a showing of "substantial parity between future operations and prior bona fide operations". *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942), a motor carrier case. "When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing". *Crescent Express Lines* v. *United States*, 320 U.S. 401, 409 (1943), a motor carrier case. "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority". *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), a water carrier case. In the last mentioned case *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, is cited in support of the statement just quoted. That case was under the motor carrier provisions of the Act and reference to it, as previously pointed out, indicates the

similar purpose applicable to both water carriers and motor carriers.

Underlying the convenience and necessity provisions of the Act, as to all carriers, is the purpose to prevent unnecessary duplications of facilities and services, with resulting injury to existing carriers, and ultimately to the public. *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 277 (1926), a railroad case, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, footnote 17 (1944), a motor carrier case and *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), supra, a water carrier case.

In the recent decision in *American Trucking Ass'ns.* v. *United States*, 73 S. Ct. 307 (January 12, 1953) the Court in upholding broad discretionary powers in the Commission with respect to rules concerning the leasing of motor vehicles said (p. 316):

> "So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause".

A similar purpose underlies the water carrier provisions of the Act. See also the cases referred to in part I of this brief.

(b) Appellant's contention misconceives the broad powers of the Commission under sections 309 and 304 of the Act.

The Commission has made plain that its authority under the statutes to specify types of equipment and service in certificates granted is to be found in the convenience and necessity provisions of section 309 of the Act, read in connection with section 304(c) of the Act, as to classification of carriers.

In the report here under consideration the Commission referred to its previous decision *Norfolk, Baltimore and*

Carolina Line, Inc., Ext.—James R., 265 I.C.C. 247, 253-4, affirmed, as to this matter, by the entire Commission, 265 I.C.C. 313, 314, which sets forth in some detail the reasons for specification of types of equipment and services in certificates issued, the statutory authority for such action, and the long and uniform practice of limiting operating rights in accordance with the type of vessels to be operated.

In the *Norfolk, Baltimore and Carolina case*, the Commission said (p. 254):

> "The Commission's authority to specify the type of vessels to be used is contained in sections 304(c) and 309(d) of the act. Section 304(c) provides that the Commission may establish such just and reasonable classifications of water carriers as the special nature of the service performed by such carriers shall require; and section 309(d) provides that there shall be attached to the exercise of the privileges granted by a certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time to time require. In the exercise of this authority the Commission uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated. *Erie & St. Lawrence Corp. Contract Carrier Application*, 250 I.C.C. 767, 780, and the Commission's report on reconsideration therein, 260 I.C.C. 235, 237-238".

Then referring to an earlier case on the subject the Commission said (254):

> "The reasons for the classification of carriers as to type of vessels used are stated in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, wherein Division 4 said:
>
> > 'Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of this type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which

> they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act.'
>
> See also *Isthmian S. S. Co. Common Carrier Application*, 250 I.C.C. 735."

The *Mechling case*, decided in 1941, was among the first decisions under the water carrier provision of the Act.

In the *Norfolk, Baltimore and Carolina case* the contention was made that the Court in the *Seatrain case*, 329 U.S. 424, had raised doubt as to whether the Commission could impose a restriction "as to the type of service a water carrier could utilize to serve its shippers". The Court, however, was not called upon to decide, and did not decide, that the Commission had no such authority under such circumstances as those in this case. Referring to that case the Commission said in the *Norfolk, Baltimore and Carolina case*, (p. 254):

> "*United States* v. *Seatrain Lines*, 329 U.S. 424, relied upon by the applicant in opposition to these precedents, presented the issue of whether the Commission could alter Seatrain's certificate, which had become effective, and did not decide the question of whether the Commission could specify the type of vessels to be used in an original certificate".

The authority of the Commission, under the provisions of the statute above referred to, to specify types of equipment and services, as in the present case, is not only supported by the Commission's decisions but by decisions of the Courts.

The District Court in the present case carefully analyzes the contentions made by Callanan on this phase of the case and concludes that the Commission has ample authority to specify the type of equipment and the service to be rendered, as here in question (R. 65-70).

The Supreme Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), supra, upheld a certificate issued by the Commission to a water carrier specifying operation "by water of motor vehicles by self-propelled vessels". There was thus a restriction on the type of traffic (motor vehicles) that could be carried and also on the type of vessel which could carry such traffic.

In *Inland Nav. Co.* v. *United States*, 76 F. Supp. 567 (1948) a Three-Judge Statutory Court sustained a certificate of the Commission issued to a water carrier (260 I.C.C. 30) authorizing it under the "grandfather" clause to operate by water "by non-self-propelled vessels with the use of separate towing vessels in the transportation of commodities generally" and "by towing vessels in the performance of general towage" between various points described in the certificate. There was thus authorized a freighting service and a towage service, while in the present case only freighting service was authorized. The Court laid considerable emphasis on the broad discretion conferred upon the Commission in administering the water carrier provisions of the Act.

In *Warner* v. *United States*, 341 U.S. 907 (1951), this Court affirmed on motion the decision of the lower Court (97 F. Supp. 580) upholding authority of the Commission to restrict a contract carrier by water as to "freighting" services, "towage" services, and chartering. The decision was under the permit provisions of section 309 applicable to contract carriers but the underlying purpose is the same as in the certificate provisions of that section.

It is true that in the *Detroit & Cleveland Navigation Company case*, the *Inland Navigation Co. case* and the *Warner case*, there was no discussion of the Commission's authority to specify types of equipment or services, but the fact is that the authority granted by the Commission in each case was subject to such specification. It is not difficult to infer that the question here raised was not brought forth in those

cases, because it was not considered to be of sufficient merit to justify judicial consideration.

The proviso against limitation of additions to equipment, facilities, or services does not deprive the Commission of authority to specify types of equipment and services. In the *Norfolk, Baltimore and Carolina Line case,* 265 I.C.C. 247, cited in the report here in issue the Commission pointed out that while the proviso in section 309(d) prohibits restrictions in a certificate on "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate," this does not prevent a specification of types of equipment or services in the scope of such certificate. It said (p. 254):

> "This proviso does not prohibit the Commission from specifying the type of vessels to be used by a certificate holder. Rather, it is a prohibition against the imposition of any term, condition, or limitation designed as a restriction against the carrier's increasing the amount of its equipment, facilities, or service."

If, for example, a carrier is limited in its certificate to the transportation of "passengers" in "self-propelled vessels", it can, consistently with this proviso, increase its service by increasing the number of passenger schedules operated and can increase the number of self-propelled vessels used in rendering such service. These are increases "within the scope" of the carrier's authority. This does not mean, however, that the carrier could embark upon a service outside and beyond the scope of its certificate, as for example, in the carrying not of *passengers* but of *freight* or in the transportation not by "self-propelled vessels" but by "non-self-propelled vessels with the use of separate towing vessels".

In the present case, as previously pointed out, there is a clear recognition of the distinction between freighting, namely, transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing ves-

sels, and of towage, namely, by towing vessels in the performance of general towage, and the certificate provides for freighting service only. That carrier, it is to be noted, is not restricted in any way as to the number or size of vessels it may use, the horsepower that may be employed, or the materials of vessel construction. The specification is a broad, general one "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" and the carrier may transport "commodities generally".

Appellant under the proviso can add to its service of freighting by increasing the amount of such service and by increasing the number of self-propelled vessels used or the number of non-self-propelled vessels with separate towing vessels. But the proviso is no warrant for breaking through the scope of the general authority of freighting, and invading the field of towing, as is here attempted.

Cornell Steamboat Company is restricted to towing. It can, of course, add to its towing service and increase the number of its towing vessels, but it cannot enter into a service beyond the "scope" of its certificate and engage in freighting service. It would be cruelly unjust to allow Callanan to disregard the scope of its certificate and invade the towage field, to the severe injury of Cornell, which is restricted to towage.

(c) Appellant unjustly attempts to uproot the long-established and uniform practice of the Commission.

The numerous cases in which the Commission has specified in certificates granted by it types of equipment and services of water carriers have been referred to above. The distinction between freighting and towage has been made and types of traffic authorized to be carried have been specified. From the general absence of complaint, it may reasonably be said that the Commission's interpretation of the statute has met with general approval by the water carrier industry, by shippers, and by the public at large.

In the *Norfolk, Baltimore & Carolina case, supra,* the Commission pointed out that under the statute it "uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated" (p. 254). It would require clear and compelling reasons to disrupt this practice and invalidate the limitations contained in nearly every certificate which has been granted by the Commission. Appellant's reasoning erroneously leads to such a result.

It is to be remembered that this Court said in *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 549 (1940) that the Commission's interpretations of the Act "are entitled to great weight," and that this "is peculiarly true" "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new' ".

The Commission acting under the water carrier provisions has made the Act work and has carried out the purpose of Congress.

(d) Appellant's reliance upon the Seatrain case is based upon a misconception and distorted view of that case.

While appellant seems to place great reliance on the *Seatrain case,* 329 U.S. 424, this case is in no way controlling here. The District Court, after careful analysis, reached this conclusion and shows that its opinion rests on solid ground (R. 67-70).

As distinguishing the *Seatrain case* from the present case, the following, among other circumstances should be considered:

(1) The "equities" are entirely different in the two cases. In the *Seatrain case,* as the lower Court points out, the Commission sought by the amended certificate to curtail severely the service which the Supreme Court said that that carrier had shown itself entitled to perform under the

"grandfather" clause and under the convenience and necessity provisions as to authorization of new service. The restriction, it was pointed out, amounted almost to a limitation of the carrier to a merely car ferry service handling railroad cars between railroads, although its service had included port to port traffic originating or delivered by truck or otherwise and not confined to interchange with railroads, and there was evidence of transportation of general commodities.

In contrast with the curtailed rights in the *Seatrain case*, the rights which were granted to Hutton and transferred to appellant were rights to perform a freighting service, which was the only service performed in the "grandfather" period and the only service as to which it was entitled to a certificate.

(2) In the *Seatrain case*, there was no consent to the amended certificate, but it was promptly objected to and complained of. The opposite is true in the present case. In parts II and III of this brief, it is shown that neither Hutton, appellant's predecessor, nor appellant made any objection to the 1944 amendment, to the transfer in 1947, or to the certificate to appellant in 1948, within the time provided for in the Commission's rules. In fact the circumstances indicated not only consent but insistence upon the terms of the certificate.

(3) A fundamental difference is that in the *Seatrain case* there was no later proceeding involving transfer of the rights in question and calling for independent judgment, while in the present case there was such independent later proceeding in which, irrespective of the change made in 1944, the Commission had full authority to retain the terms and conditions in the certificate as in the public interest.

In the *Seatrain case*, the amended certificate complained of was issued after the original certificate had become final. In the present case, aside from the consent by Hutton to the 1944 certificate and the consent by his administratrix and appellant to the terms of that certificate as authorized to be transferred in the 1947 proceeding,

there was no certificate finally issued to Callanan until 1948 and prior to this final act the Commission could impose terms and conditions as to the transfer and specify the service and type of equipment in the order thus issued. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). There was no question in the *Seatrain case* of a late transfer of the amended certificate complained of. Certainly in the present case, aside from other reasons, the transfer proceeding gave the Commission full opportunity properly to impose conditions and specify terms, and thus avoid the harsh injustice of permitting appellant to perform a service, namely towage, which it had failed to show that it was entitled to perform under the "grandfather" clause.

(4) While the Court in the *Seatrain case* said that section 309(d) contains no express reference to specification of service and that there is such reference in the corresponding provisions applicable to motor carriers, this, it is believed, does not have the significance which appellant claims. Under section 309(d) the Commission is expressly authorized to "specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *" subject to a proviso against restricting "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate".

While literally the language at the beginning of the quotation refers merely to a specification of "the route or routes over which or the ports," the remaining language and other provisions of the same section show a broader authority is provided. The literal interpretation would appear clearly unreasonable in barring the Commission, for example, from denying a carrier authority to perform *passenger* operation by self-propelled vessels under the

"grandfather" clause when its only past operation in the "grandfather" period had been in the transportation of *property* in non-self-propelled vessels with the use of separate towing vessels. A search as to the legislative history of this section fails to disclose any statement that the difference in language between the section and the motor carrier section was intended to exclude authority to specify equipment and service.

It is to be noted further that under the "grandfather" clause (section 309(a)) the later service must be "so operated" as on "grandfather" date. Moreover, there is provision as to furnishing "seasonal service" and as to operations of the "character in question," together with a provision as to the effect of interruption of "service". Also in section 309(c) the Commission is empowered, as to new services proposed, to authorize the "whole or any part" of the operations covered by the application if it finds, among other things, that the carrier is qualified to perform "the service" proposed and that the "proposed service, to the extent authorized by the certificate" is required by public convenience and necessity. These provisions indicate a clear intention to vest the Commission with authority to deal with "service" in granting certificates. The proviso in section 309(d) as to addition of service indicates that the general rule is to include service. The provision in section 309(d) as to the imposition of "reasonable terms, conditions, and limitations" further indicates the broad authority conferred on the Commission.

As previously pointed out, this section is to be read in connection with section 304(c), which authorizes the Commission to establish reasonable classification of groups of carriers. The related provisions of section 311 as to application for temporary authority to provide "service" for which there is an urgent need, further indicate the intent of Congress to deal with "service" under section 309, since temporary authority is usually the forerunner of a request for permanent authority. In the *Seatrain case* there is no mention of the carrier-classification provisions of section

304, the provisions of section 309(a) and (c) or the temporary authority provisions, referred to above.

(5) In the *Seatrain case* while the certificate complained of was set aside, the original certificate which was left in operation provided for service by "self-propelled vessels". It also limited the carrier to transportation of commodities and thus excluded authority to transport passengers.

(6) In the *Seatrain case*, there is is no authority for the contention that the proviso prohibiting restriction of "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require" (section 309(d)) prevents the Commission's action in the present case. The certificate granted in the present case does not limit the size, horsepower, or material of equipment construction, or otherwise deal with details of operation. Appellant under the proviso of section 309(d) may increase the amount of the service authorized, namely freighting, and the number of vessels to be used in the service. Such additions are permitted as within the "scope of the certificate."

The *Seatrain case* furnishes no justification for appellant's contention here as to alleged unauthorized revocation of the 1942 certificate and unauthorized specification of types of equipment or services.

V. APPELLANT'S CONTENTION AS TO ALLEGED UNAUTHORIZED REVOCATION OF THE CERTIFICATE OF JULY 17, 1942, TO HUTTON IS WITHOUT MERIT.

In view of what has previously been pointed out in parts II, III and IV of this brief, little more need be said in dealing with appellant's claim of unauthorized revocation of the 1942 Hutton certificate, which contained no reference to types of equipment that could be used.

The 1944 Hutton certificate cancelled the 1942 certificate, and as previously explained, added the specification that

the transportation of commodities should be by "self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels". This certificate patterned the authority in accordance with the service (freighting) which Hutton actually performed in the critical "grandfather" period and as to which, and not towage, he was entitled to a certificate under the "grandfather" clause. Although the certificate was not to become effective until two and a half months after it, and the report accompanying it, were issued (R. 11-14), no objection was made by Hutton within this time or within the 30-day period provided for in the Commission's rules for petitions for reconsideration in such cases. In fact, as previously pointed out, neither Hutton nor his administratrix ever made any objection, and the question was not raised by appellant until seven years later as a patent afterthought in the present proceeding.

Aside from the fact that the 1944 Hutton certificate was a clarifying amendment of the 1942 Hutton certificate and gave the carrier all it was entitled to under the "grandfather" provisions of the Act, it cannot properly be said that there has been an unauthorized revocation, in view of the following three reasons, any one of which is fatal to appellant's claim:

(a) **The 1944 Hutton certificate.** Although as above pointed out, ample time was provided under the Commission's rules for objecting to or contesting the 1944 Hutton amendment, this was not done, and the attempt to do so seven years thereafter is too late. The petition of appellant to restore the Hutton 1942 certificate was filed on July 20, 1951, and was denied by order of the Commission, dated July 7, 1952.* Appellant has not filed a petition for reconsideration of that order and has not filed complaint in Court against such order. The Commission in its report in the present case has pointed out that consent by the carrier bars the claim of unauthorized revocation and distinguishes the case from the *Seatrain case*, 329 U.S. 424 (R. 26).

* These documents have not been printed but are subject to the stipulation as to their use (R. 79).

(b) **The 1947 transfer proceeding.** In that proceeding appellant, for a purchase price of only $2,750, sought to have the Commission authorize transfer to it of the rights under the Hutton certificate of March 7, 1944 (not the 1942 certificate). The application was under section 312 of the Act and the regulations made pursuant thereto.**

Under these regulations approval by the Commission was permissible only "upon a showing," among other things, that "the water carrier operations authorized under the certificate sought to be transferred will be consistent with the public interest".

The Commission thus had the power in the *Transfer case*, in passing upon consistency with the public interest, to authorize transfer of all or only a part of the operating rights sought to be purchased. Therefore, as an original and independent exercise of authority, it could determine whether in the public interest the type of equipment and service should be specified. Certainly, in view of the "grandfather" showing, the authorization of towage would not have been consistent with the public interest. The Commission was thus justified in authorizing transfer of the rights under the 1944 certificate to appellant under the terms of that certificate. Its report and order, dated August 18, 1947, were not contested.

It is to be noted that the rights authorized to be transferred did not include those which had been authorized in the 1944 certificate on the New York State Barge Canal. If appellant were now to disclaim its consent to the elimination of the New York State Barge Canal rights from the certificate in the *Transfer case* this would seem to be a shocking proposition. The contention here made by appel-

** Under these regulations (title 49 part 306) provision is made for the filing of information with the Commission and for the issuance of "an appropriate certificate" "superseding the certificate * * * transferred" (sec. 306.6). The rules further provide, among other things (sec. 306.9): "The transfer of any certificate or permit under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water carrier operations authorized under the certificate sought to be transferred will be consistent with the public interest".

lant, in the light of its request for transfer of the 1944 rights, of its insistence then that the certificate could not be attacked, and its consent thereto, appears to be equally shocking.

The *Transfer case* is thus a second and independent reason why appellant's claim of unauthorized revocation is unsound.

(c) **The 1948 certificate, the first and only one issued to appellant.** Pursuant to the decision in the *Transfer case* the Commission issued a certificate to appellant, dated February 5, 1948, but not to become effective until March 19, 1948. There was no objection to this certificate within the time provided therein or in the rules of the Commission. The contention as to alleged revocation, therefore, comes too late.

In addition, it is believed that since the 1948 certificate represented "the final act or order" authorizing operation by appellant, the Commission up to that point, irrespective of its action in 1944, had full authority to approve the specification of equipment or service which was included in that certificate and which carried forward the provisions of the 1944 Hutton certificate.

This conclusion appears to be sustained by the decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) where the Commission was upheld in restricting operating rights purchased by a railroad-owned motor carrier transferee, on the ground that until "the final act or order" validating the operation by issuance of a certificate to the transferee, the Commission had full authority to frame the certificate (p. 448).

That the *Seatrain case*, *supra*, does not sustain appellant's contention is pointed out in part IV of this brief, p. 46.

Its claim is based on last minute technicalities and is utterly without merit.

VI. APPELLANT'S CONTENTION THAT THE COMMISSION'S ORDER CONSTITUTES A REVOCATION OR MODIFICATION OF SECTION 314 AUTHORIZING ALLOWANCES UNDER THE ACT IS ERRONEOUS.

The basic fallacy in appellant's contention that the allowance provisions of section 314 of the Act are not complied with by the Commission in this case arises from its failure to recognize that allowances cannot properly be paid by a carrier in respect to services which it is not authorized to perform. In the present case the Commission has found, and the District Court has sustained it in finding, that it is not authorized under its certificate to perform towage, that the service actually performed under the allowance tariff is towage, that the payment of allowance in respect to such unauthorized services is unlawful and is properly forbidden by the Commission in the order here in issue.

In numerous cases involving the question of allowances by railroads to shippers for switching service in their plants, on the theory that such service is included under the line-haul rates, allowances have been condemned where it was found that the service performed by the shipper was beyond the transportation found to be authorized under the line-haul rates. The Commission has been sustained by this Court in a number of such cases appealed to it. In *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402, for example, the Court emphasized the discretionary duties of the Commission in determining where the transportation ended under the line-haul rates and sustained the Commission in finding "that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed." The Commission was, therefore, held to have "power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it" (p. 408).

Appellant in relying upon *Interstate Com. Com.* v. *Diffenbaugh*, 222 U.S. 42 (1911), fails to recognize that that case makes plain that an allowance may be paid only in connection with a service the carrier itself is authorized to perform. This appears from the statement in the opinion "As the carrier is *required to furnish this part of the transportation* upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it" (Italics supplied). Moreover, in the forty years since that case was decided the importance of upholding the exercise of the Commission's discretionary powers has been emphasized. In *General American Tank Car Corp.* v. *El Dorado T. Co.*, 308 U.S. 422 (1940), the Court in dealing with certain allowance practices in respect to private tank cars said (p. 432) "that the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission". In a later stage of the case (328 U.S. 12 (1946)), the Court said that the question as to whether the "allowances and practices" were lawful and reasonable were "administrative problems calling for investigation and determination by the Commission" (p. 17).

The importance of upholding the Commission in the exercise of discretion conferred upon it and the heavy burden upon the one seeking to set aside the Commission's action are referred to in part I of this brief and no good purpose would be served by repeating what was there said.

The service here in question is found by the Commission to be unauthorized towage and allowances in respect thereto are, therefore, unlawful. The Commission in its report (R. 22) describes appellant's operations in considerable detail. It shows that appellant is engaged in the production of crushed stone and transports this commodity in its vessels. It said "In the same tows in which the crushed stone is transported it operates as a carrier for hire in the movement of brick loaded on its deck scows or chartered scows, and on scows of the shippers for which it makes allowances

in accordance with its tariff I.C.C. No. 2" (R. 28).

Referring to the rates published by appellant the Commission said (R. 29):

> "These rates do not include insurance. The same rates also apply on the movement of brick in scows furnished by shippers, for which so-called allowances are made and the demurrage rules are inapplicable. When the petitioner is not required to return the shipper's scow light to point of origin, a 'credit' or additional allowance is made. [Rate examples are then given] The credit varies with the distance the scow is towed light. While the petitioner's rates in connection with the movement of brick have been reduced twice, the allowances or credits have remained unchanged".

The Commission found that while appellant published its tariff on April 17, 1949, and provided for net rates, after deduction of allowances, equal to the towage rates of Cornell it was unable to divert brick traffic from the latter until after appellant reduced its rates on March 26, 1950. It then diverted a large amount of traffic (R. 29, 30).

Describing the manner in which the brick traffic was handled by appellant under the allowance tariff the Commission said (R. 31):

> "No bills of lading or shipping orders were or are issued by the petitioner in connection with the transportation of the shippers' scows loaded with brick. Nor are there any written agreements between the parties bearing on the use of such scows by the petitioner. Under the arrangements by which the scows are used the petitioner may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor".

After distinguishing transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels (freighting) from towing services, including

reference to the *Dixie Carriers case*, 278 I.C.C, 417, and the *Campbell Transportation Co. case*, 260 I.C.C. 107 (R. 31, 32), the Commission said (R. 32):

> "Petitioner's rates applicable to the movement of brick from up-river points to New York Harbor provide for the return of shippers' scows light to points of origin, and as hereinbefore stated, its published rules with respect to free time and demurrage are inapplicable when scows are furnished by shippers. In addition, petitioner admits that it may not load a shipper's scow at New York for an up-stream movement in lieu of returning the vessel light to its owner at origin. The fact that a charge is made for return of the empty scow to point of origin indicates that its original tender to the carrier was as a part of the consignment to be towed. From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioner in connection with the movement of freight in shippers' scows constitutes a towage service".

The Commission had earlier called attention to the fact that "The shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him". (R. 28), that "These rates do not include insurance" (R. 29), and that there are no "written agreements between the parties bearing on the use of such scows" by the appellant (R. 31).

Upon the facts thus found the Commission concluded that appellant "has been and is performing the service of towage without appropriate authority therefor" and that "the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32).

These findings are well within the administrative discretion of the Commission, are in accordance with decisions of this Court, and are not subject to being disturbed or reversed on judicial review. Clearly there is no ground for

any contention of arbitrary or capricious action by the Commission or absence of evidence to sustain its finding.

The Commission's conclusions are not only sound but are amply sustained by previous decisions, including the *Dixie Carriers case*, 278 I.C.C. 418, *supra*, *Union Barge Line Corp. case*, 260 I.C.C. 563, and *Campbell Trans. Company case*, 260 I.C.C. 107.

It is to be noted that in the railroad industry, in which to some extent allowances are made for private cars, there are no corresponding categories such as freighting and towage, as in the water carrier industry, and regulations as to allowances may, therefore, differ. The distinction in the water carrier industry, however, is important and the Commission is acting in the public interest in protecting towage rights from unauthorized invasion by a carrier limited to freighting rights.

Appellant apparently contends that equipment "leased" from a shipper although a part of the carrier's facilities in freight service would not be under the allowance provision of the Act and that this is evidence of unreasonableness of the Commission's findings in the present case. This, however, is a misconception of the allowance provisions. See, for example, *Payment for Leased Motor Vehicles on Cotton*, 276 I.C.C. 675, a case involving allowances for lease of motor vehicles.

The Commission's findings are just and proper and should be sustained. They have been approved by the entire Commission, and by the District Court.

VII. APPELLANT'S CLAIM THAT THE COMMISSION HAS FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT IS UTTERLY WITHOUT SUBSTANCE AND IS FRIVOLOUS IN CHARACTER.

Neither in the exceptions to the proposed report of the examiner nor in the petition for reconsideration of the Division's decision by the entire Commission did appellant make any contention as to section 8(b) of the Administrative Procedure Act. Such failure is fatal to the contention here made. *United States* v. *Hancock Truck Lines*, 324 U.S. 774 (1945); *General Transp. Co.* v. *United States*, D.C.D. Mass., 65 F. Supp. 981, affirmed *per curiam* 1946, 329 U.S. 668, rehearing denied 1946, 329 U.S. 827, and *United States* v. *L. A. Tucker Truck Lines*, 73 S. Ct. 67 (1952).

The District Court in overruling this contention states that "this objection seems to border on the frivolous" (R. 70).

Appellant apparently admits that findings have been made as to the question of towage or freighting but complains that the Commission's report does not deal adequately with its contentions as to alleged revocation and as to alleged absence of authority in the Commission to specify types of equipment and services. The Commission points out the basic error as to the first contention in that appellant's certificate has been consented to and that the situation is, therefore, different from that in the *Seatrain case, supra* (R. 26). As to the other contention it called attention to the *Norfolk, Baltimore and Carolina case*, 265 I.C.C. 247, in which authority to specify types of equipment and services are fully discussed and explained (R. 25). Moreover, there is nothing to show that appellant submitted proposed findings to the Commission under section 8(b).

Atlanta & St. Andrews Bay Ry. Co. v. *United States*, 104 F. Supp. 193 (1952) relied upon by appellant was a petroleum rate case having no factual similarity to the present case. The underlying findings were held to be contrary to the ultimate findings (p. 201). The District Court in the

present case referred to the findings as "entirely adequate and complete, indeed praise-worthily so" (R. 71), and they are well within the principles established by this Court in numerous cases. See *Inland Navigation Co.* v. *United States*, 76 F. Supp. 567 (1948), and cases cited therein.

Appellant's contention is devoid of merit.

CONCLUSION.

Appellant's case, it is believed, rests on legalistic technicalities and claims made too late in equity. It unjustly seeks to expand rights granted to it in a certificate by the Commission to include services which it is not authorized to perform and the performance of which has resulted and will result in severe injury to appellee, Cornell Steamboat Company.

For the reasons set forth above, it is respectfully submitted that the decision of the lower Court should be affirmed.

Respectfully submitted,

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